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JURISDICTIONAL STATEMENT

This appeal is from a judgment terminating Appellant's parental rights to his son, A.S.W., entered by the Juvenile Division of the Circuit Court of the Twenty-Third Judicial Circuit of Missouri on November 19, 2002. On November 12, 2003, the Court of Appeals for the Eastern District of Missouri affirmed that judgment *per curiam*, and supplemented its order with a memorandum opinion.

Appellant filed a timely request for transfer. This Court sustained Appellant's request for transfer on February 24, 2004. Accordingly, this Court has jurisdiction of this cause as if on original appeal. MO. CONST. Art. V, § 10.

This case does not involve the constitutionality of a statute or any of the other areas reserved to the exclusive appellate jurisdiction of this Court under MO. CONST. Art. V, § 3.

STATEMENT OF FACTS

Introduction

In Respondent's view, Appellant's statement of facts is deficient and fails to comply with MO. SUP. CT. R. 84.04 (c), in that it fails to accurately and concisely set forth the facts of this case in an unbiased fashion, and omits testimony and evidence favorable to the trial court's judgment. Accordingly, Respondent elects to submit his own Statement of Facts under MO. SUP. CT. R. 84.04 (f).

Nature of Case and Procedural Background

This Appeal involves A.S.W., a child born on February 16, 1998, in St. Louis County, Missouri. (T. 10). Appellant is the child's father. On January 25, 2001, the Juvenile Officer of the Twenty-Third Judicial Circuit of Missouri filed a petition under § 211.031. 1. (1), MO. REV. STAT., in the interest of the child. (L.F. 47-49). As it relates to Appellant, that petition alleged that "the father of the juvenile is inappropriate for placement due to disability." (L.F. 48). On May 21, 2001, the Juvenile Division of the Circuit Court of the Twenty-Third Judicial Circuit entered a neglect judgment under § 211.031. 1. (1), MO. REV. STAT., finding that the allegations of the petition were true. At that time, the child was placed in the legal custody of the Division of Family Services for foster care. (Supp. L.F. 1-4). A Guardian Ad Litem represented Appellant at this proceeding.

On March 13, 2002, the Juvenile Officer filed a petition to terminate the parental rights of both parents under § 211.447. 4. (3)[1], MO. REV. STAT., alleging that the "father has a significant brain injury which renders him incapable of providing necessary care, custody, and control of the juvenile." (L.F. 73-75).The petition to terminate parental rights was tried on October 22, 2002.

Evidence and Testimony at Trial

The Juvenile Officer first called Shirley Smith, a clinical coordinator with Restcare Premier, a clinic that specializes in rehabilitation of individuals with head

[1] The child has been under the jurisdiction of the juvenile court for a period of one year, and the court finds that the conditions which led to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist, that there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future, or the continuation of the parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home. In determining whether to terminate parental rights under this subdivision, the court shall consider and make findings on the following: [(a), (b), and (d), omitted]
(c) A mental condition which is shown by competent evidence either to be permanent or such that there is no reasonable likelihood that the condition can be reversed and which renders the parent unable to knowingly provide the child the necessary care, custody, and control;

injuries. (T. 12). Ms. Smith testified that she was a certified and licensed occupational therapy assistant, was in the process of receiving a certificate as a brain injury specialist and clinical instructor, and had nine years of experience in the field. (T. 13). The trial court found that Ms. Smith was "extensively qualified in her field." (T. 32). Ms. Smith testified that Appellant was a resident at Restcare for two years, from March 2000 until May 2002. (T. 16-17). During that time, Appellant received occupational therapy, physical therapy, and speech therapy for a job-related head injury. (T. 17). Appellant's admitting problems in 2000 were poor memory, poor judgment, poor insight, poor problem solving in managing day to day situations, and poor judgment with regard to personal safety. (T. 18-20).

In June 2002, Appellant was discharged from Restcare "with supervision of a family member." Restcare recommended that he have "intermittent supervision," or someone within the household with him to oversee his care. (T. 22). Restcare did not consider Appellant to be capable of living independently, (T. 36), and believed that he needed someone with him "for his safety." (T. 37).

Upon his discharge, Restcare administered to Appellant the Mayo-Portland Adaptability Inventory-3, (T. 25), a test commonly used in the rehabilitation field to assist a patient in determining quality of care. (T. 22). With regard to his self-awareness, Appellant had a "severe problem" with "recognition of personal limitations and disabilities and how they interfere with every day activities." (T. 26). Appellant would have difficulty in relating with significant family relationships twenty-five to seventy-five percent of the time. (T. 26-27).

In reference to his ability to rear a child, Appellant's score on the Mayo-Portland Adaptability Test indicated that he would have a severe problem and would require supervision from others seventy-five percent of the time or more. (T. 28).

The Juvenile Officer next called Dr. James Powers, a clinical psychologist. (T. 40). Dr. Powers testified that he conducted a psychological evaluation of Appellant on August 29, 2002. (T. 41). Dr. Powers administered the Wechsler Adult Intelligence Scale, Revised, the Rorschacht Diagnostic Technique, the Thematic Apperception Test, the Incomplete Sentence Blank test, and conducted a clinical interview with Appellant. (T. 42). From his testing and interview, Dr. Powers concluded that Appellant's thought process was concrete and immature, (T. 44), that he would have difficulty in controlling his mood, and that he was likely to make errors in more complicated or difficult parenting areas. (T. 46-47). Dr. Powers stated that Appellant suffered from a "cognitive disorder," which he defined as another name for a "brain injury." (T. 48). This condition was permanent. (T. 51). In Dr. Powers' opinion, it was inappropriate for Appellant to independently care for a child. (T. 49). If he were to do so, Dr. Powers concluded that Appellant could make errors, bad decisions, and exercise poor judgment and place the child in danger. (T. 49-50). Dr. Powers testified that he had "serious questions" regarding the child's safety if Appellant had primary responsibility for the child. (T. 50). Dr. Powers also testified that Appellant, if asked about a specific situation in child rearing, would likely be able to articulate an appropriate

response. Appellant's difficulty would arise if called upon to carry out an appropriate response to an imminent parenting situation or need. (T. 50).

Appellant testified on his own behalf. (T. 80). Appellant testified that in January 2000, he suffered a fall at work and sustained a head injury. (T. 83). From January 2000 until March 2000, Appellant was hospitalized. (T. 84). In March 2000, Appellant moved into Restcare. (T. 84). During the time that he was a patient at Restcare, Appellant testified that at some time he resided alone in an apartment, although Restcare personnel monitored him daily. (T. 105). Appellant moved to his sister's home in June 2002. (T. 81). Appellant stated that "as for now, I stay with my sister Donna," (T. 80), although he expressed a wish to locate either to a residence on Compton in St. Louis or to a home to be built on acreage to be acquired near Salem, Missouri. (T. 110, 115). Appellant testified that he was incapable of employment. (T. 81).

In his sister's home, Appellant paid the rent, the utilities, and purchased all groceries for the household. (T. 127-128). Appellant testified that he also cleaned the household, did laundry, fed and cared for a dog, and did the grocery shopping and cooking for the household. (T. 82). Appellant testified that he was alone between 7:30 p.m. until 7:30 a.m., while his sister worked. (T. 81). Appellant testified that he had been incarcerated for ten years for "sodomizing" his two nieces, who were eleven and fifteen at the time of the incidents. (T. 121, 126).

When asked about what he learned in parenting classes, Appellant testified that he "learned that a child, before they can enter school, has to know their name,

their ABCs, count from 1 to 10, know their address and telephone number." (T. 88). Directly asked about nutrition, Appellant stated that he “studied nutrition, how to raise a child, to raise a child on formula, to feed the child properly that he can handle it; and then on, on, on get to where the child can handle food” (T. 89).

Directly asked about child safety, Appellant testified that “Child safety? Make sure there’s plenty of food in the house for the child. Make sure there’s a nice bed for him to sleep in. Make sure he has plenty of clothes, plenty of vegetables, the nutrition that he is supposed to have.” (T. 90). Directly asked what he would do if the child had a fever, Appellant stated that he would take the child to a doctor. (T. 93). Directly asked how he would support the child, Appellant testified that:

> I was planning on supporting him by having his own toys, a swing set. I bought him a new swing set to put in the backyard. I got him a little swimming pool to put in there. And I’d gotten him a new bike. And first I had him on a tricycle with training wheels on it - - well, I’m sorry - - a tricycle, and then I bought him a bicycle with training wheels for when he was just two years old. And I’d just always have him play, and I would buy him toys for in the house and everything he wanted. (T. 114).

Appellant testified about his financial ability to support A.S.W. with worker's compensation only upon prompting by his counsel. (T. 115).

Appellant was asked on cross-examination whether he anticipated any problems with A.S.W. as the child matured. (T. 131). Appellant responded that "it may come that he may not have a real high-paying job and bills may keep - - and he may have financial trouble." (T. 131). Asked whether he anticipated any problems as the child progressed toward adolescence, Appellant responded "No." (T. 131). Only when prompted did Appellant state that teenagers may have problems with "partying," "going a little too far with the girl." (T. 132). Appellant testified that he did not anticipate having to deal with any such issues as a parent. (T. 132).

Appellant next called Colette Nagel, a Division of Family Services worker. (T. 140). Ms. Nagel testified that she taught a parenting class, and that Appellant had attended this class in June 2002. (T. 141). Ms. Nagel felt that Appellant successfully completed the class, (T. 141), although she had not reviewed any of the materials in the possession of the Division of Family Services regarding Appellant's history with his child. (T. 144). Ms. Nagel testified that almost everyone successfully completes her parenting classes, (T. 143) because completion is based on attendance and peaceful attentiveness. (T. 146). Ms. Nagel testified that she gave a letter to Appellant in which she stated that he did a "Great Job,"(L.F. 132), but that she gave that commendation to participants in her parenting classes as a standard practice. (T. 146-147).

Donna Young, Appellant's sister, testified on his behalf. (T. 148). She testified that Appellant came to live with her in June 2002, (T. 148-149), at the

request of Restcare. (T. 153-154). At that time, Restcare recommended that she provide him with supervision, and she promised that she would do so. (T. 154). At the time of trial, Ms. Young was not providing supervision to Appellant, and indicated her belief that he did not need it. (T. 154). Ms. Young stated that she did not believe that Appellant had "any limitations at all." (T. 153). Ms. Young testified that Appellant paid the rent, the electrical bill, the telephone bill, and cared for the house. (T. 151). During the time her husband was alive and living with Appellant and her prior to August 2002, Appellant also assisted in caring for him, helping him dress and shave. (T. 152).

Judgment of Trial Court

On November 19, 2002, the Juvenile Division of the Twenty-Third Judicial Circuit entered its judgment terminating Appellant's parental rights. (L.F. 106-110). The court found that the child had been under its jurisdiction under § 211.031. 1. (1), MO. REV.STAT., for a period of one year or longer, since May 21, 2002, in part due to Appellant's disability. (L.F. 107).

The court found that the conditions that led to the assumption of jurisdiction still persisted because:

> The father of the juvenile has a mental condition, cognitive disorder, which is permanent or such that there is no reasonable likelihood that it can be reversed and which renders the father unable to knowingly provide the juvenile the necessary care, custody, and control. As a result of such condition, the father has poor insight and

judgment, has difficulty with safety issues and problem solving, would have significant difficulty in family relationships, and would have severe difficulty in parenting and would require supervision from others in parenting a majority of the time.

The court also found that there was little likelihood that said conditions would be remedied at an early date so that the child could be returned to the parent in the near future, or that continuation of the parent-child relationship greatly diminished the child's prospects for early integration into a permanent and stable home. (L.F. 107).

As required by the statute, the court considered each of the four factors set forth in § 211.447. 4. (3), MO. REV. STAT. (L.F. 108). The court found that there was no evidence to support a judgment of termination under subdivisions (a), (b), and (d). With respect to subdivision (c), the court found that Appellant did suffer from a mental condition which was permanent and such that there was no reasonable likelihood that it could be reversed and which rendered the father unable to knowingly provide the child, A.S.W., the necessary care, custody, and support. (L.F. 108).

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ERR BECAUSE ITS JUDGMENT TERMINATING APPELLANT'S PARENTAL RIGHTS WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE AND WAS SUPPORTED BY SUBSTANTIAL EVIDENCE UNDER § 211.447. 4 (3), MO. REV. STAT., BECAUSE THE CONDITION THAT LED TO THE ASSUMPTION OF JURISDICTION STILL PERSISTED AND APPELLANT'S CONDITION HAD NOT IMPROVED SO THAT THE CHILD COULD BE RETURNED TO APPELLANT'S CUSTODY.

MO. CONST. Art. V, § 10	4, 26
MO. CONST. Art. V, § 3	4
MO. SUP. CT. R. 84.04 (c)	5
MO. SUP. CT. R 84.04 (f)	5
MO. REV. STAT. § 211.031. 1. (1)	5, 12, 18, 21
MO. REV. STAT. § 211.447. 4. (3)	6, 13, 17, 18, 22, 25, 26, 27, 28, 29
MO. REV. STAT. § 211.443	16
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In Interest of C.L.M., 625 S.W.2d 613 (Mo. banc 1981)	22

In Interest of C.S., 910 S.W.2d 811 (Mo. App. E.D. 1995) 17, 28

In Interest of D.C.H., 835 S.W.2d 533 (Mo. App. S.D. 1992) 18, 22, 27

In Interest of D.L.M., 31 S.W.3d 64 (Mo. App. E.D. 2000) 19

In Interest of J.Y., 637 S.W.2d 670 (Mo. banc 1982) 17

In Interest of K.A.W., No. SC85683 (Mo. banc 2004) 16

In Interest of M.E.W., 729 S.W.2d 194 (Mo. banc 1987) 17, 18, 25

State v. Knese, 985 S.W.2d 759 (Mo. banc 1999) 20

II.

The Trial Court Did Not Err In Terminating Appellant's Parental Rights In That The Trial Court Correctly Applied Missouri Law When It Terminated Appellant's Parental Rights Based On A Petition Alleging That Appellant Suffered From A Brain Injury Because Expert Testimony Proved That Brain Injury Is Equivalent To A Mental Condition As Required By § 211.447. 4. (3), MO. REV. STAT.

MO. REV. STAT. § 211.447. 4 (3) 28

In Interest of C.S., 910 S.W.2d 811 (Mo. App. E.D. 1995) 28

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR BECAUSE ITS JUDGMENT TERMINATING APPELLANT'S PARENTAL RIGHTS WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE AND WAS SUPPORTED BY SUBSTANTIAL EVIDENCE UNDER § 211.447. 4 (3), MO. REV. STAT., BECAUSE THE CONDITION THAT LED TO THE ASSUMPTION OF JURISDICTION STILL PERSISTED AND APPELLANT'S CONDITION HAD NOT IMPROVED SO THAT THE CHILD COULD BE RETURNED TO APPELLANT'S CUSTODY.

Respondent, as an officer of the court charged with the responsibility of initiating a termination of parental rights proceeding, recognizes the serious nature of this action. The sanctity of the family, and the right of a parent to raise a child without governmental intrusion, is and should be afforded the ultimate of constitutional and procedural protection. *In Interest of K.A.W.,* No. SC85683 (Mo. banc 2004). The General Assembly has provided for the termination of parental rights in appropriate, statutorily designated, circumstances. The General Assembly has mandated that the termination statutes be construed to promote the best interests and welfare of the child involved. MO. REV. STAT., § 211.443. In addition to protecting the constitutional rights of the parents and the birth family relationship when appropriate, juvenile courts are to apply the statutes in recognition of the "entitlement of every child to a stable and permanent home." *Id*. This Court has held that once a statutory ground for termination of parental rights

is proven, the primary concern in a termination of parental rights proceeding is the best interest of the child. *In Interest of M.E.W.*, 729 S.W.2d 194 (Mo. banc 1987).

Preliminarily, this cause does not involve the exclusive original jurisdiction of this Court to determine the constitutionality of § 211.447. 4. (3), MO. REV. STAT, nor has Appellant placed the constitutionality of that section in issue in this Court. Although Appellant, in his Motion for Rehearing or Transfer to the Missouri Supreme Court filed with the Court of Appeals for the Eastern District, called for the reexamination of § 211.447. 4. (3) under the Due Process Clause, he has not reiterated that call here. Moreover, constitutional challenges must first be addressed to the trial court, if they are to be raised on appeal. *In Interest of J.Y.*, 637 S.W.2d 670 (Mo. banc 1982).

Rather, the issue here is whether the trial court, under the standard of review applicable in court-tried cases, correctly determined that § 211.447. 4. (3), MO. REV. STAT., permitted the termination of Appellant's parental rights by clear, cogent and convincing evidence on the evidence presented.

Appellant and Respondent do not quarrel about the standard of review in this matter. A judgment of a juvenile court terminating parental rights must be affirmed unless there is no substantial evidence to support it, the judgment is against the weight of the evidence, or the judgment erroneously declares or applies the law. *In Interest of C.S.*, 910 S.W.2d 811 (Mo. App. E.D. 1995). A decision of a court terminating parental rights should be set aside on appeal "on the ground that it is against the weight of the evidence only with caution and with a firm belief

that the decree or judgment is wrong." *In Interest of D.C.H*., 835 S.W.2d 533, 534 (Mo. App. S.D. 1992). Further, on appeal, deference should be given to the ability of the trial court to hear the evidence and weigh the credibility of the witnesses. *D.G.N. v. S.M.*, 691 S.W.2d 909, 912 (Mo. banc 1985). Where there is a conflict in the testimony or evidence, the reviewing court should review the facts in the light most favorable to the judgment of the trial court. *In Interest of M.E.W.*, 729 S.W.2d 194, 196 (Mo. banc 1985).

There is no question that A.S.W. had been subject to the jurisdiction of the juvenile court for a period of one year as required by § 211.447. 4. (3), MO. REV. STAT., nor is there any question about the condition that led to assumption of jurisdiction as the condition pertained to Appellant. On January 24, 2001, the Juvenile Division assumed jurisdiction over the person of A.S.W. by entering a temporary protective custody order that placed him in the temporary custody of the Division of Family Services. (Supp. L.F. 5). Jurisdiction attached at that time, MO. SUP. CT. R. 111.01. The Juvenile Officer's petition filed in the interest of the juvenile alleged in part that "the father of the juvenile is inappropriate for placement due to disability." (L.F. 48). On May 21, 2001, the Juvenile Division entered its judgment under § 211.031. 1. (1), MO. REV. STAT., and found that the allegations of the petition were true, including the allegations that pertained to the father. (L.F. 54).

In his Petition to Terminate Parental Rights, filed pursuant to § 211.447. 4. (3), MO. REV. STAT., on March 13, 2002, the Juvenile Officer alleged that

Appellant "has a significant brain injury which renders him incapable of providing necessary care, custody and control of the juvenile." (L.F. 74).

As noted by Appellant, parental rights should not be terminated due to a mental condition unless there is evidence that the child at issue was either harmed or is in danger of harm. *In Interest of D.L.M*., 31 S.W.2d 64 (Mo. App. E.D. 2000). In setting this standard, *D.L.M.* dealt with a case in which the schizophrenic parent could at times care for her child, and when her mental condition deteriorated, was able to arrange other care for her child. *Id*., at 69.

The standard set by *D.L.M.* is satisfied here. Again, *D.L.M*. dealt with a parent who suffered from schizophrenia. Her condition was treatable with medication, and when she complied with medication, she could care for her child. Further, when her condition deteriorated, she knew to ask for assistance, and could and did make arrangements for her child's care by others. 31 S.W.3d at 69. The facts of this case are different, and show a permanent, rather than episodic, disabling mental condition on Appellant's part.

At trial, Respondent called two persons who testified as experts regarding Appellant's permanent, disabling mental condition. First, Respondent called Shirley Smith, an employee of Restcare Premier, a facility dedicated to the rehabilitation of individuals who have suffered head injuries. Appellant now challenges Ms. Smith's qualifications as an expert. Appellant's Brief, 23. Appellant's trial counsel made no objection to Ms. Smith's qualifications at trial; Appellant concedes this. Without objection being made to evidence offered at

trial, nothing is preserved for appellate review. *See, e.g., State v. Knese*, 985 S.W.2d 759, 766 (Mo. banc 1999). Moreover, even if Appellant had objected at trial, it is also well settled that "[t]rial courts retain broad discretion over . . . the admission of evidence and appellate courts will not interfere with those decisions unless there is a clear showing of abuse of discretion." *Hancock v. Shook*, 100 S.W. 3d 786, 795 (Mo. banc 2003). Abuse of discretion occurs only "when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Id*. In this case, the action of the trial court demonstrably was not unreasonable, or arbitrary, or lacking in careful, deliberate consideration. When an objection was made to the Guardian Ad Litem's question to Ms. Smith about Appellant's disability as defined by the Social Security Act, the trial court sustained the objection, stating that there was no evidence of Ms. Smith's experience with Social Security, although "she's extensively qualified in her field." (T. 32). Clearly, the trial court considered the foundation laid for Ms. Smith's expert testimony, and limited it to areas where a proper foundation was laid.

Ms. Smith testified that in May, 2002 - six months before the trial - Appellant was discharged from Restcare. (T. 16-17). At the time of discharge, according to Ms. Smith, Appellant was to be supervised by another adult in the household. (T. 22). At the time of discharge, Appellant was deemed incapable of living independently, and needed someone with him "for his safety." (T. 36-37).

At the time of discharge, Appellant's scores on a standardized test accepted as reliable in the field indicated that he would have a severe problem in rearing a child and would require supervision from others in child-rearing seventy-five percent of the time. (T. 28). Appellant also had a severe problem with recognition of personal limitations and disabilities and how they interfere with every day activities. (T. 26). Although he lived with his sister at the time of trial, Appellant's testimony indicated that he planned to leave her home, and relocate on his own either to a rural location or in the City of St. Louis. (T. 110, 115). This expressed intention only buttresses the testimony of Ms. Smith about Appellant's poor insight into his unfortunate limitations.

Secondly, Respondent called as an expert witness Dr. James Powers, a licensed psychologist. (T. 40-41). Again, Appellant's counsel made no objection at trial to Dr. Powers' credentials as an expert, and again, Respondent submits that failure to so object waives Appellant's opportunity for appellate review on the issue of Dr. Power's expertise.

Appellant concedes the failure to object to Dr. Powers' qualifications at trial. Appellant's Brief, 24. Notwithstanding this, Appellant now argues that the trial court should have either refused to admit Dr. Powers testimony or given it little weight regarding the issue of Appellant's mental condition on the grounds that Dr. Powers was a psychologist and not a medical doctor. Appellant supplied no authority for this position, and it is inconsistent with existing case law. In a neglect adjudication under § 211.031, MO. REV. STAT., Justice Higgins of this

Court held that the trial court could properly consider and credit the opinion of a psychologist on a parent's mental condition, even when a medical doctor rendered a different opinion in the proceeding. The opinion of the psychologist was not to be disallowed, nor was the opinion of the medical doctor to be given greater weight because of the medical degree. The trial court was to evaluate the basis of each expert's opinion, and give each opinion appropriate weight. *In Interest of C.L.M*., 625 S.W.2d 613, 615 (Mo. banc 1981). The Southern District of the Court of Appeals, citing *C.L.M*., has specifically held that the testimony of a psychologist was probative on the issue of a parent's mental condition and sufficient to justify termination of parental rights under the language now found in § 211.447. 4. (3)(c). *In Interest of D.C.H.*, 835 S.W.2d 533, 535 (Mo. App. S.D. 1992).

Dr. James Powers testified at trial that Appellant's thought process was concrete and immature, that he would have difficulty in controlling his mood, and that he was likely to make errors in more complicated or difficult parenting areas. (T. 44-47). Dr. Powers stated that Appellant suffered from a "cognitive disorder," which Dr. Powers stated was another name for a "brain injury." (T. 48). This condition was permanent. (T. 51). Dr. Powers believed that it was inappropriate for Appellant to independently care for a child. (T. 49). If Appellant were to do so, Dr. Powers believed that Appellant could make errors and bad decisions, exercise poor judgment, and place the child in danger. (T. 49-50). Dr. Powers testified that he had "serious questions" about A.S.W.'s safety if Appellant had primary

responsibility for the child. (T. 50). Appellant disregards totally this oral testimony of Dr. Powers, and relies heavily on a written report by Dr. Powers. Appellant's Brief 8-9, 25-26, 33. The transcript of the trial does not reflect that any written report by Dr. Powers was offered into evidence on the issue of whether there was statutory authority to terminate Appellant's parental rights under § 211.447. 4. (3), and specifically on the factor of Appellant's mental condition, its severity, and its permanence. Accordingly, Dr. Powers' oral testimony at trial is the only evidence of his opinion before this Court on the issue of Appellant's mental condition. As set forth above, Dr. Powers' testimony at trial does not support Appellant's argument that Dr. Powers believed Appellant able to independently parent.

In opposition to the Juvenile Officer's expert testimony from Shirley Smith and Dr. Powers, Appellant offered only his own testimony, testimony from his sister, Donna Young, and Division of Family Services worker Colette Nagel.

Appellant's own testimony illustrates the validity of Dr. Powers' testimony. His comments, even when led by his counsel, could legitimately have been found inappropriate by the trial court and indicative of the statutorily required inability to "knowingly provide the child the necessary care, custody, and control." For example, when asked about child safety, Appellant stated "Child safety? Make sure there's plenty of food in the house for the child. Make sure there's a nice bed for him to sleep in. Make sure he has plenty of clothes, plenty of vegetables, the nutrition that he is supposed to have." (T. 90). Directly asked how he would support the child, Appellant testified that:

> I was planning on supporting him by having his own toys, a swing set. I bought him a new swing set to put in the backyard. I got him a little swimming pool to put in there. And I'd gotten him a new bike. And first I had him on a tricycle with training wheels on it - - well, I'm sorry - - a tricycle, and then I bought him a bicycle with training wheels for when he was just two years old. And I'd just always him play, and I would buy him toys for in the house and everything he wanted. (T. 114).

Asked on cross-examination whether he anticipated any problems with A.S.W. as the child matured, Appellant responded that "it may come that he may not have a real high-paying job and bills may keep --- and he may have financial trouble." (T. 131). Asked whether he anticipated any problems as the child approached adolescence, Appellant stated "No." (T. 131). Only when prompted did Appellant indicate limited awareness of the challenges of raising an adolescent child. (T. 132).

Colette Nagel, a Division of Family Services worker, also testified for Appellant. (T. 140). Ms. Nagel testified that Appellant completed her parenting classes, and that successful completion of her parenting classes is dependent only on attendance and attention without disruption. (T. 146). She testified that she did not have specific knowledge of Appellant's situation. (T. 144).

Donna Young, Appellant's sister, also testified for Appellant. (T. 148). Ms. Young testified that Appellant had resided with her since June 2002, and that he

paid the household rent, the electrical bill, and cared for the household. (T. 151). During the time her husband had been alive, Appellant had also assisted him in hygiene. (T. 152). Ms. Young acknowledged that Appellant was discharged to her on the condition that she provide supervision for him, but she felt he did not need it, and had no "limitations at all." (T. 153). The trial court could properly have found such evidence unpersuasive and lacking in credibility, since the witness was Appellant's sister and benefited financially and otherwise from her living arrangement with him.

As the trier of fact, the trial court had all of the testimony and the live demeanor of the witnesses as they testified, to assess, evaluate, and compare the testimony of Respondent's witnesses with that of Petitioner's witnesses, Shirley Smith and Dr. Powers. Deference should be given to the ability of the trial court to hear the evidence and weigh the credibility of the witnesses. *D.G.N. v. S.M.*, 691 S.W.2d 909, 912 (Mo. banc 1985). At most, Appellant can claim that his evidence conflicts with that of the experts offered by the Juvenile Officer, Dr. James Powers and Shirley Smith of Restcare Premier. Under such circumstances, where there is a conflict in the testimony or evidence, this Court should review the facts in the light most favorable to the judgment of the trial court. *In Interest of M.E.W.*, 729 S.W.2d 194, 196 (Mo. banc 1985).

Appellant now further contends that both the trial court and the Court of Appeals, in its memorandum under MO. S.CT. R. 84.16(b), improperly applied or interpreted § 211.447. 4. (3), MO. REV. STAT., by giving undue and prejudicial

weight to Appellant's prior conviction for sexual offenses involving minors. Appellant's Brief, 34. In effect, Appellant argues that the Court of Appeals affirmed the judgment because of the conviction, and not because of the evidence relating to Appellant's mental condition as a factor under § 211.447. 4. (3).

In responding to this argument, it is first noteworthy that the trial court made no mention whatsoever of Appellant's criminal conviction in its order terminating parental rights. (L.F. 106-110). Since this Court, by reason of its order of transfer from the appellate court, now has jurisdiction of this matter as if the appeal was originally filed here - and the memorandum by the Court of Appeals never written - the inquiry could end here. MO. CONST. art. V, § 10.

However, to deal with the argument on its merits, the Court of Appeals mentioned Appellant's convictions only by quoting from Dr. Powers' trial testimony. (A. 7-8). In context, that testimony was:

> I felt it was inappropriate for [Appellant] to independently care for a child. . . .
>
> There are questions in terms of [Appellant's] capability. There is a potential danger for him to make errors, to make bad decisions, to show poor judgment that could place either himself or his son in jeopardy.
>
> The results of the intellectual assessment did not indicate significant deficits, but there were deficits that raised concerns. Those concerns take on greater importance in view of the sexual

> abuse for which he was incarcerated, and it takes on greater importance in view of the incident in which he showered with his son.
>
> When I combine all those together, in my opinion it raises serious questions regarding his son's safety if [Appellant] had primary responsibility of his son. (T. 49-50).

Thus, Dr. Powers, not the Court of Appeals, mentioned Appellant's history of sexual abuse of children and consequent incarceration. Dr. Powers' mention of that history was clearly in the context of his professional opinion to illustrate Appellant's poor judgment and lack of insight in showering with his small son given his background as a sexual abuser, and with the requirement that his visits with A.S.W. be supervised.

In sum, the finding of the trial court that termination of parental rights was justified under § 211.447. 4. (3), MO. REV. STAT., was supported by substantial evidence and was not against the weight of the evidence. At the time of trial, A.S.W. had been in foster care under the jurisdiction of the juvenile court for twenty-one months. The original reason for that foster care, pertaining to Appellant, was that Appellant was disabled. At the time of trial on the termination of parental rights petition, expert testimony, properly admitted without objection, demonstrated that Appellant had a mental condition described interchangeably as cognitive disorder or a brain injury. Expert testimony, properly admitted without objection, proved that this condition was permanent. Expert testimony proved that

this condition severely limited Appellant's ability to care for A.S.W., and such limitations would place A.S.W. in danger in Appellant's care.

II.

The Trial Court Did Not Err In Terminating Appellant's Parental Rights In That The Trial Court Correctly Applied Missouri Law When It Terminated Appellant's Parental Rights Based On A Petition Alleging That Appellant Suffered From A Brain Injury Because Expert Testimony Proved That Brain Injury Is Equivalent To A Mental Condition As Required By Section 211.447. 4. (3), MO. REV. STAT.

In his Petition to Terminate Parental Rights, the Juvenile Officer alleged that termination of Appellant's parental rights was factually justified under § 211.447. 4. (3), MO. REV. STAT., because Appellant " has a significant brain injury which renders him incapable of providing necessary care, custody, and control of the juvenile." (L.F. 74). Appellant argues that termination based on this allegation is not authorized under § 211.447. 4. (3) (c), MO. REV. STAT, because the allegation refers to a physical injury, rather than to a "mental condition" as required by that section. Appellant thus argues that the judgment of the trial court should be reversed because the court erroneously declared or applied Missouri law. Inaccurate declaration or misapplication of the law constitutes grounds for reversal of a judgment. *See, e.g., In Interest of C.S.*, 910 S.W.2d 811 (Mo. App. 1995).

In arguing that the condition herein was physical and not mental, Appellant confuses the consequences of the condition with its cause. The cause of Appellant's "brain injury," to use that term, was a traumatic, physical, head injury. (T. 17). The statutory question is whether Appellant, as the result of that trauma, suffered from a "mental condition which is shown by competent evidence either to be permanent or such that there is no reasonable likelihood that it can be reversed and which renders the parent unable to knowingly provide the child the necessary care, custody and control." MO. REV. STAT. §211.447. 4. (3), (c). The answer to that question is yes.

Dr. James Powers, a clinical psychologist, testified that Appellant suffered from “cognitive disorder,” which he defined as another name for a “brain injury.” (T. 48). This condition is recognized in the field of psychology as a "mental condition." (T. 48). With regard to Appellant, this condition is permanent. (T. 51). Accordingly, the trial court did not err in finding that the pleaded "brain injury" was a mental condition within the meaning of the statute, and therefore did not erroneously declare or apply Missouri law.

It may be suggested that termination of Appellant's parental rights is not justified under the statute because the "brain injury," and the consequences of it, were not Appellant's fault. It is true that there is no evidence that Appellant's fall at work, and the resulting head trauma and cognitive mental condition, were his fault. Yet, it is also true that schizophrenia, for example, occurs without the fault of the schizophrenic, and the legislature clearly intended that parental rights could

be terminated for this reason, if the statutory effects on the schizophrenic's cognitive ability to parent could be demonstrated.

In sum, Appellant has failed to demonstrate that the trial court erroneously declared or applied Missouri law, and his second point on appeal should be denied.

CONCLUSION

For the reasons set forth, Respondent prays that the judgment of the trial court herein be affirmed.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

Copies of the foregoing Brief, together with a floppy disk containing the same, were mailed on this _____ day of _____, 200____, to the following attorneys of record: Mr. Craig Kallen, III, Attorney at Law, 100 South Brentwood, Suite 400, Clayton, MO 63105, and Mr. John Appelbaum, Attorney at Law, 4139 Jeffco Blvd., Arnold, MO 63010.

_____

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CERTIFICATE OF COMPLIANCE

The undersigned certifies on this ____ day of _____, 20___, that this Brief includes the information required by MO. R. CIV. P. 55.03, and complies with the limitations contained in MO. R. CIV. P. 84.06(b), and further certifies that the disk containing this Brief filed with the Brief has been scanned for viruses and is virus-free. The number of words in this Brief is 6, 909.

_____

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